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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NO. 173

AUBREY LEE LITTLE, *Petitioner*

v.

MISSOURI PACIFIC RAILROAD COMPANY,
Respondent

On Petition for Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Houston

BRIEF FOR MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

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Opinion Below

There was no written opinion by the District Court in this case. The opinion of the Court of Civil Appeals for the First Supreme Judicial District (Pet. App. A) is reported at 319 S.W. 2d 785.

Jurisdiction

The judgment of the Texas Court of Civil Appeals was entered on December 18, 1958, and a motion for rehearing was timely filed. Thereafter Petitioner timely filed his Petition for Writ of Error in the Supreme Court of Texas and upon it being dismissed he timely filed a Motion for Rehearing. Thereafter this Petition for Writ of Certiorari was timely filed, on July 2, 1959.

Questions Presented

(1) Whether Section 6 of the Federal Employer's Liability Act (45 USC, Sec. 56), which by its plain language speaks only to Federal Courts, supersedes and overrides a state venue statute which regulates venue of all classes of cases filed in the State of Texas and which does not discriminate against FELA causes, in a cause alleged under the FELA and the Safety Appliance Act?

Statutes Involved

Sec. 6 of the Federal Employer's Liability Act, (45 USC, Sec. 56), the material portions of which are as follows:[1]

> "Under this Chapter an action may be brought in a District Court of the United States, in the district of the residence of the Defendant, or in which the cause of action arose, or in which the Defendant shall be doing business at the time of commencing such action."

[1] The complete section is printed in Appendix A. Page 15 hereof

Article 1995 of Vernon's Annotated Texas Civil Statutes, the material portions of which are as follows:[2]

> "Suits against railroad corporations . . . for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the County in which the injury occurred, or in the County in which the Plaintiff resided at the time of the injury. . . ."

Statement

Petitioner at the time he was injured and at the time he filed this suit was residing in McLennan County, Texas, and was injured in that County while working in the course and scope of his employment with Respondent. Thereafter he filed suit in the District Court of Harris County. At the time of Petitioner's injury and at the time suit was filed, Respondent was doing business in both McLennan County and Harris County, Texas. Petitioner alleged a cause of action under the provisions of the Federal Employer's Liability Act.

Argument

Petitioner's sole claim to the right to maintain his suit in a State Court in Harris County, Texas, is his construction of Section 6 of the Act. He contends that Section 6 of the Act prescribes venue for suits filed in the State Courts, as well as for suits filed in the Federal Courts. It is the position of Respondent, which contention was upheld by the Texas Court of Civil Appeals in an able opinion which is attached to Petitioner's Petition as Ap-

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[2] The complete text of Section 25 is printed in Appendix B Page 16 hereof.

pendix A, that Section 6 of the Act does not undertake to prescribe venue for suits of this character which are filed in the State Courts.

In order to properly evaluate these diametrically opposite contentions, the wording of the Act itself should be referred to. The first paragraph of such Section deals with the question of limitation and is not concerned at all with the issue before this Honorable Court. The first sentence of the second paragraph of the Section reads as follows:

> "Under this Chapter an action may be brought in a District Court of the United States, in the district of the residence of the Defendant, or in which the cause of action arose, or in which the Defendant shall be doing business at the time of commencing such action."

A careful reading of this sentence will clearly show beyond doubt that Congress was prescribing venue for the Federal Courts. The plain wording of the Act is to the effect that an action may be brought in a District Court of *the United States* in any one of three locations. The use by Congress of the words *"in a District Court of the United States"* clearly shows the intent of Congress to be that this provision prescribing venue relates to the Federal District Courts and not to the State Courts. The next sentence in the Section, being the last sentence, is the only sentence in such section which relates specifically to State Courts and that sentence provides that the jurisdiction of the courts of the United States shall be concurrent with those of the courts of the several states. The plain language of the Act specifically states that the venue is prescribed in such Act for the Federal Court

System. There is no indication in any way or manner that Congress was attempting to prescribe venue for cases of this character filed in the state courts.

The plain wording of the Act was recognized by this Honorable Court in the case of *B & O v. Kepner* (1941) 314 U.S. 44, 62 S. Ct. 6. The very issue which is involved in this case was laid at rest by this Honorable Court in the Kepner case during the course of its opinion in that case when it stated (Page 9 of 62 S. Ct.):

> *"Section 6 establishes venue for an action in the Federal Court."* (Emphasis ours)

Subsequently, this Honorable Court reaffirmed the interpretation of Section 6 made in the Kepner Case Supra, in 1942, when this Honorable Court decided the case of *Miles v. Illinois Central Ry. Co.*, 315 U.S. 692, 62 S. Ct. 827. During the course of the opinion in that case this court stated (Page 830 of 62 S. Ct.):

> "Words were simultaneously adopted recognizing the jurisdiction of the state courts by providing that the Federal jurisdiction should be concurrent. *The venue of the state court suits was left to the practice of the forum.* The opportunity to present causes of action arising under the FELA in the state courts came, however, not from state law, but from the federal law. By virtue of the Constitution, the courts of the several states must remain open to such litigants on the same basis that they are open to litigants with causes of action springing from a different source.
>
> " * * * This is not to say that states can not control their courts. We do not deal here with the power of Missouri, by judicial decision or legislative enactment

to regulate the use of its courts generally as was approved in the Douglas and the Chambers cases, note 6 supra.[3]

"We are considering another state's power so control its own citizens that they can not exercise the Federal privilege of litigating a Federal right in the court of another state."

The foregoing quotations from opinions heretofore rendered by this court construing this act give effect to the intention of the Congress, as evidenced by the plain wording of the statute. The only conclusion to be drawn from the wording of the statute and from the quotations taken from the opinions, as cited above, is that the venue of suits in FELA causes in state courts was left to the practice of the state.

The Petitioner relies upon these same cases, to some extent and contends that the holding made by this Honorable Court in these cases is determinative of the question presented in this case. Such is not correct, as the exact holding of this court, in each of the cases cited above, is not material. What is material to the point presented here is the expressions of this Honorable Court, as quoted above. The actual holdings are not material and we shall so demonstrate. In the Kepner case this Honorable Court was dealing with the attempt of a state court (Ohio) to enjoin one of its citizens from prosecuting an action under the provisions of the Federal Employer's Liability Act in

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3. The cases referred to by the court are the cases of Chambers v. Baltimore & Ohio Railroad Company, 207 U.S. 142, 28 S. Ct. 34, 52 L.Ed. 143, and Douglas v. New York-New Haven R. Co., 279 U.S. 377, 49 S. Ct. 355, 73 L.Ed. 747.

a Federal Court in another state (New York). The accident made the basis of this suit had occurred in Ohio. This Honorable Court held that the Ohio State Court could not enjoin Plaintiff from prosecuting his action in a Federal Court situated in the State of New York. That holding wholly fails to support Petitioner in the instant case for the reason that under the very wording of the Act the employee had a right to bring a suit in a Federal Court in a district where the carrier was doing business. Certainly the holding made by this Honorable Court in that case is not material to the issue presented in the instant case.[1]

Similarly, the holding of this Honorable Court in the case of *Miles v. Illinois Central Ry. Co.*, 315 U.S. 698, 62 S. Ct. 827 (1942), to the effect that a state court could not enjoin one of its citizens from prosecuting a Federal Employer's Liability Act claim in the state court of another state, does not in any manner militate against the holding of the Texas Court of Civil Appeals in this case. Likewise the holding of this Honorable Court in the case of *Pope v. Atlantic Coast Line Railroad Co.*, 73 S. Ct. 749, 345 U.S. 379, 1953, which merely reaffirmed the holding of this Honorable Court in the Miles Case, Supra, does not have any effect upon the issue in the case at bar. This Honorable Court in that case merely reaffirmed the holding of the Miles Case, and in addition thereto, held

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[1] The Kepner case was of course decided prior to the enactment of Section 1404(A) of the Judicial Code (28 USC Section 1404). Of course since the enactment of such Section, all civil actions including Federal Employer's Liability Act actions, filed in the Federal Courts, are subject to the doctrine of forum non convenience. Ex parte Collett (1949) 337 U.S. 55, 69 S. Ct. 944

that Section 1404(A) of the Judicial Code of 1948[5], was not applicable to cases filed in the state courts.

However, one portion of this court's opinion in the Pope Case, Supra, is helpful in determining the proper approach to the problem at hand. In the Pope Case the petitioner was attempting to pursuade this Honorable Court that a Federal statute was applicable to a state court, just as the petitioner in the instant case is. In rejecting this contention, this court stated (Page 752 of 74 S. Ct.):

> "Section 1404(A) by its very terms, speaks to federal courts; it addresses itself only to that federal forum in which a lawsuit has been initiated; * * * it does not speak to state courts * * *."

The reasoning applied by this Honorable Court in the Pope Case, in reaching the conclusion that Section 1404(A) did not apply to Federal Employer's Liability Actions filed in state courts, is applicable to the proper decision of the instant case. In the Pope Case this Honorable Court noted that the Section in question did not purport to apply to cases other than those styled in Federal Courts. In the instant case it should be noted that Section 6 of the Federal Employer's Liability Act does not purport to control venue of Federal Employer's Liability actions which are filed in state courts. It, by its very terms, only purports to deal with the venue question as it relates to Federal Courts.

Petitioner's reliance upon the decision of this Honorable Court in the case of *Boyd v. Grand Trunk Western Rail-*

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[5] That Section reads as follows: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

way Co., 338 U.S. 263, 70 S. Ct. 26 (1949), is not of any support to his contention. The Boyd case merely holds that a contract restricting the petitioner's choice of forum falls within the prohibition of Section 5," of the Federal Employer's Liability Act. It does not purport to deal with the right of a state to regulate venue of actions filed in that state's courts.

By way of resume, it should be noted that no case cited by the Petitioner in his petition for a writ supports the contentions made by him in such petition. Neither the Miles, Kepner, Pope or Boyd cases are similar to the instant case with respect to the factual situation. The language used by this Honorable Court in deciding the Kepner and Miles cases clearly support the Respondent's position. In each of those cases this court states that venue of cases filed in the state courts are left to the practice of the forum and in particular in the Miles case, this court states very plainly (Page 831 of 315 U.S.) that nothing said in such opinion should be construed as saying that the states can not control their own courts. It should also be noted that the Texas courts are open to suits brought under the provision of the Federal Act, as they are to suits

" Section 5, 45 USC, Section 55, reads as follows: "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: PROVIDED, that in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought." Apr. 22, 1908, c. 149, Section 5, 35 Stat. 66.

based upon causes of action arising from other sources. The employee who brings his suit under the Federal Act has the same right as the plaintiff who was injured in a crossing accident. In addition thereto, the very reasoning used by this court in the Pope Case, Supra, in holding that Section 1404(A) did not affect actions of this character filed in the state courts, is applicable to the situation present in the instant case and fully supports the Respondent's position. That approach is simply that where the statute by its very terms does not purport to direct or deal with in any manner actions of this character filed in state courts, this Honorable Court should not read such into the statute.

It should also be noted that the Petitioner's choice of venue is not so free as Petitioner would lead one to believe. If this action had been filed in a Federal District Court in Houston—where venue is prescribed by Section 6, it would have been subject to the doctrine of forum non conveniens, as set out in Section 1404 of 28 U.S.C.A.[7] As noted *Supra*, that act provides that for the convenience of the parties and witnesses, a District Court may transfer the case to any other district or division. So that even if Petitioner had filed his writ in Federal District Court, here in Houston, where venue lay under Section 6, it probably would have been moved to the Federal District Court sitting at Waco, McLennan County, Texas, as the accident occurred there, Petitioner lives there and quite probably all of the material witnesses reside there.

While of course the doctrine of forum non conveniens is not available to transfer a case from one county to

[7] Quoted in footnote (5), Supra.

another county in the State of Texas, the same result is reached by applying the Texas Venue Statutes. Respondent's point is simply that Petitioner does not have an unrestricted right, under Section 6 of the Act, to choose the site of his trial in the Federal Court System. It would certainly be a strange situation to intrepret the Federal Venue Statute in such a manner as to give the Petitioner an unrestricted choice when he files his suit in state court, when the very Federal Act which he relies upon to give him that choice is modified by another Federal Act which allows the trial court to transfer the cause to a more convenient district. In other words, Petitioner wants the advantage of one Federal Act without the limitations of another Federal Act.

There is another cogent reason why this action should be governed by the Texas Venue Statute. The United States Supreme Court in the case of *Missouri v. Mayfield*, 340 U.S. 1, 71 S. Ct. 1, 95 L.Ed. 3 (1950), held that a state court could, under the doctrine of forum non conveniens, properly refuse to entertain actions under the Federal Employer's Liability Act, where the accident occurred out of the state, and neither party was a resident of the state. Certainly if a state, under such circumstances, can refuse to entertain the action at all, it can regulate the venue of such action within the state when it does entertain the action, where there is no discrimination against Federal Employer's Liability Act cases. Of course, there is no discrimination against such cases by Subdivision 1995, as it applies to all suits against railroad companies for personal injuries whether Federal Employer's Liability Act cases or not.

Plaintiff's alternative ground upon which he relies to maintain venue in Harris County is Section 30 of Article 1995 which reads as follows:

> " . . . Whenever in any law authorizing or regulating any particular character of action; the venue is expressly prescribed, suit shall be commenced in the County in which jurisdiction may be so expressly given."

The Plaintiff is attempting to rely upon Section 30 on the theory that Section 56 is a statute expressly prescribing the venue of the action. As we have noted earlier, Section 56 does not attempt to or in any way affect venue of suits filed in the State District Courts. Since it has no reference or any effect with reference to actions filed in the State Courts, it cannot be considered an express statute setting out venue. If a Statute is not applicable primarily, certainly it cannot be considered as being applicable indirectly through the use of Section 30, Article 1995.

Conclusion

Since the plain unambiguous wording of Section 25 of Article 1995 prescribes venue as being in McLennan County, Texas, and since this Honorable Court does not attempt to affect venue with reference to the state courts in the slightest, the Respondent respectfully submits that the action of the Honorable Court of Civil Appeals in reversing the cause and transferring same to the District Court of McLennan County, Texas, was correct.

WHEREFORE, Premises considered, Respondent prays that the Petition for Writ of Certiorari filed herein by the Petitioner be denied.

Respectfully submitted,

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AUGUST, 1959

The Attorney for the Petitioner, Aubrey Lee Little, is Mr. Albert P. Jones, American Investors Building, Houston, Texas. A copy of this brief has been delivered to him.

HOWARD S. HOOVER
Attorney for Respondent

APPENDIX A

ACTIONS; LIMITATIONS; CONCURRENT JURISDICTION OF COURTS

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. Apr. 22, 1908, c. 149, Sec. 6, 35 Stat. 66; Apr. 5, 1910, c. 143, Sec. 1, 36 Stat. 291; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, Sec. 2, 53 Stat. 1404; June 25, 1948, c. 646, Sec. 18, 62 Stat. 989; 45 U. S. Code, Sec. 56.

APPENDIX B

Section 25: Railway personal injuries. — Suits against railroad corporations, or against any assignee, trustee or receiver operating any railway in this State, for damages arising from personal injuries, resulting in death or otherwise, shall be brought either in the county in which the injury occurred, or in the county in which the plaintiff resided at the time of the injury. If the defendant railroad corporation does not run or operate its railway in, or through, the county in which the plaintiff resided at the time of the injury, and has no agent in said county, then said suit shall be brought either in the county in which the injury occurred, or in the county nearest that in which the plaintiff resided at the time of the injury, in which the defendant corporation runs or operates its road, or has an agent. When an injury occurs within one-half mile of the boundary line dividing two counties, suit may be brought in either of said counties. If the plaintiff is a nonresident of this State then such suit shall be brought in the county in which the injury occurred, or in the county in which the defendant railroad corporation has its principal office. As amended Acts 1947, 50th Leg. p. 104, ch. 71, § 1.